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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH BRIAN MORALES, Defendant and Appellant.	2d Crim. No. B294448 (Super. Ct. No. 1453737) (Santa Barbara County)

Joseph Brian Morales appeals from the judgment entered after a jury acquitted him of deliberate and premeditated first degree murder, but convicted him of second degree murder. The jury found true two enhancement allegations: (1) appellant committed the murder for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)),[1] and (2) a principal discharged a firearm causing death. (§ 12022.53, subds. (d), (e)(1).) The trial court found true allegations that appellant had previously been convicted of a serious felony (§ 667, subd. (a)(1)) and a serious or

[1] All further statutory references are to the Penal Code.

violent felony within the meaning of California's Three Strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Appellant was sentenced to prison for 55 years to life "preceded by a five year determinate term" for the prior serious felony (§ 667, subd. (a)(1).)

Appellant contends that the evidence is insufficient to support the second-degree murder conviction. In addition, he contends that the trial court erroneously failed to instruct the jury sua sponte on the natural and probable consequences doctrine and the lesser included offense of involuntary manslaughter. We affirm.

Facts

Background

Gregorio Agustine was a member of the West Park criminal street gang. He became "a shot caller for the whole [C]ounty of San Luis Obispo." He "collect[ed] taxes [from drug dealers] in different neighborhoods." The taxes were paid to "the big homies," i.e., members of the Mexican Mafia.

Agustine was a violent gang member. He had personally stabbed at least seven or eight people. He had been involved in "[a] lot" of shootings where he had "actually pulled the trigger."

Agustine spoke on the phone with appellant, a Northwest and Sureno criminal street gang member who was in prison. Appellant identified persons from whom Agustine could collect taxes.

Appellant was a "primo." According to appellant, "[a] primo means that you've been given blessing to work for a specific Mexican Mafia member . . . . You have actually been like accepted and inducted into . . . his crime family . . . ."

Appellant was in charge of collecting taxes from drug dealers in Northwest's territory. In his opening brief, appellant acknowledges that he "controlled the activities of the Northwest gang from within prison."

Agustine and appellant "got real close with phone calls." At appellant's request, Agustine provided drugs to appellant's girlfriend. Agustine and appellant "work[ed] out a peace treaty between West Park and Northwest" criminal street gangs. At the time of the treaty, Agustine was "in charge of West Park."

Agustine's Version of Events Leading to the Murder

Agustine testified as follows:[2] Appellant complained to Agustine that Javier Limon, the murder victim, "didn't want to pay taxes." Limon, who was selling drugs in Northwest gang territory, insisted that he was "paying taxes to Toto," a "big homie" from Long Beach. Appellant "found out somehow" that Limon was not paying taxes to Toto and that "he was using [Toto's] name in vain." Using a "big homie's" name in vain "can get you killed." Appellant said that Limon "was no good, that he thought [Limon] was an informant."

Appellant asked Agustine if he "could take care of it." Appellant said "he really wanted [Limon] out, like whacked," and he "wanted [Agustine] to get rid of [Limon]." Agustine testified, "I know he wanted me to kill Javier Limon." But Agustine did

[2] Pursuant to a case settlement, Agustine pleaded guilty to first degree murder and admitted a gang allegation. A special circumstances allegation was dismissed, and he agreed to testify truthfully at Morales's trial. If he testified truthfully, he would receive a sentence of 25 years to life.

not remember whether appellant had used the word "kill." Agustine believed that Limon was a Northwest gang member.[3]

Agustine asked appellant, "'[H]ow come your people don't take care of it?'" Appellant replied, "'[M]y home boys, they ain't with it like that.'" Appellant said there were "orders from up there" to take care of Limon. Agustine understood that the orders had come from "the big homies" because Limon had used "Toto's name in vain."

Agustine "told [appellant he] would take care of it, kill Javier Limon." Appellant said that he would set up a drug transaction between Limon and Agustine. Appellant stated, "'[A]ct like you're going to make a transaction and whenever you see him, take care of it, you know.'"

On the day Limon was killed, appellant telephoned Agustine and said he had "'got ahold of [Limon].'" He gave Limon's phone number to Agustine. Agustine directed other gang members to use a fake drug transaction as a ruse for killing Limon.

Limon's Cause of Death

The cause of death was "multiple perforating and penetrating gunshot wounds." Limon was shot 10 times.

Appellant's Testimony

Appellant testified that Limon did not have to pay taxes to him because Limon was working for Toro, a "big homie." "[T]here's never been a problem with [Limon] refusing to pay taxes." Appellant did not ask Agustine to harm, "take care of," or "get rid of" Limon.

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[3] A gang expert testified that Limon was not a gang member, but he "associated with different Sureno criminal street gang members."

Prosecutor's Closing Argument to the Jury

The prosecutor argued to the jury that appellant was "nothing less than an aider and abettor who intended to kill Javier Limon." Appellant "tells Agustine to kill [Limon], to take care of it. And [they] agree to do it." But the prosecutor discussed the possibility of an unintentional murder based on implied malice. The prosecutor said, "[I]f you believe [appellant] didn't have the intent to kill specifically, that he didn't make that specific order but rather just sent [Agustine] off to beat up Mr. Limon," then the jury should find appellant guilty of murder on an implied malice theory. The trial court instructed the jury on implied malice pursuant to CALCRIM No. 520.

Sufficiency of the Evidence to Support Second Degree Murder Conviction

"Murder is the unlawful killing of a human being . . . 'with malice aforethought.' [Citation.] [Appellant] was convicted of second degree murder, which is 'the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.' [Citation.] Malice may be either express (as when a defendant manifests a deliberate intention to take away the life of a fellow creature) or implied." (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) "Implied malice does not require an intent to kill. Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.)

Appellant argues that, because the jury acquitted him of first degree murder, it necessarily found that he was "not guilty of premeditated murder." "[T]he jury rejected evidence of premeditated express malice as lacking credibility." Appellant continues: "Any express malice on [his] part, under the prosecutor's theory [he] requested Agustine kill Limon . . . , *had to be* premeditated, i.e., considered beforehand . . . . Hence, the jury's acquittal on the charge of first-degree murder . . . demonstrates . . . the jury necessarily determined there was insufficient proof beyond a reasonable doubt [he] acted with express malice." "Review of the evidence *in the light most favorable to the prosecution's case* . . . leaves a single theory of second-degree murder offered in the prosecution's case for consideration, i.e., aiding and abetting *with implied malice*." Appellant "contends his conviction was not supported by sufficient evidence of implied malice."

Appellant in effect is claiming that, if the jury's second degree murder verdict were based on a finding of express malice, it would be inconsistent with his acquittal of first degree murder. Therefore, the second degree murder verdict must have been based on a finding of implied malice. Such a finding would render the two verdicts consistent.

Appellant's reasoning is mistaken. "It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] The United States Supreme Court has explained: '[A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-

evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient.' [Citation.] [¶] [¶] . . . An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 656.)

The standard of review is as follows: "'[W]e review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] . . .' [Citations.] The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]" (*Cravens*, *supra*, 53 Cal.4th at pp. 507-508.)

Substantial evidence supports the second-degree murder conviction upon the hypothesis that the jury's verdict was based on express malice, i.e., appellant's intent that Agustine kill Limon. Appellant did not just tell Agustine that Limon was not paying taxes. He also said that Agustine was using "big homie" Toto's "name in vain." Agustine testified that using a "big homie's" name in vain "can get you killed." Moreover, appellant said that Limon "was no good, that he thought [Limon] was an informant." A gang member testified that an informant has "a target on [his] head." An informant is "a rat, . . . a snitch . . . . Bottom of the barrel in [gang] society." Agustine testified, "[I]f I

seen somebody out there in the world that I knew he was a rat, to me it's mandatory for me to like take care of it. Either beat them up or if I can kill them, kill them, shoot them."

Thus, when appellant told Agustine to "take care of it," that "he really wanted [Limon] out, like whacked," and he "wanted [Agustine] to get rid of [Limon]," it was reasonable for the jury to infer that appellant wanted Agustine to kill Limon. There was no question in Agustine's mind as to what appellant intended. Agustine was asked, "[H]ow did you know that [appellant] wanted you to kill Javier Limon?" Agustine replied, "I know when he told me to get rid of [Limon]."

Even if the jury's second degree murder verdict were based on implied malice, substantial evidence would still support the verdict. If appellant had intended to merely discipline Limon by having Agustine beat him up, appellant should have known that the confrontation could escalate into a homicide. Agustine was a violent gang member who had previously stabbed and shot at people. Appellant told Agustine that Limon was not only refusing to pay taxes, but was also using a "big homie's" name in vain and was an informant. In these circumstances the jury could reasonably infer that, by asking Agustine to take care of Limon and get rid of him, appellant committed "'"'an act, the natural [and probable] consequences of which [were] dangerous to life, which act was deliberately performed by a person who [knew] that his conduct endanger[ed] the life of another and who act[ed] with conscious disregard for life.'" [Citation.] . . .' [Citation.]" (*Cravens*, *supra*, 53 Cal.4th at p. 507.)

Trial Court's Alleged Failure to Instruct on Natural and Probable Consequences Doctrine

Appellant contends that the trial court erred in not instructing the jury sua sponte on the natural and probable consequences doctrine. "'[U]nder the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime [the target offense], but also "[of] any other offense that was a 'natural and probable consequence' of the crime aided and abetted."'" (*People v. Chiu* (2014) 59 Cal.4th 155, 158; see also *People v. Canizalez* (2011) 197 Cal.App.4th 832, 852 [the doctrine "imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense"].[4] "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Appellant argues that the trial court should have instructed on the natural and probable consequences doctrine because the prosecutor advanced the theory that appellant may have committed implied malice murder by asking Agustine to

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[4] "Senate Bill No. 1437 . . . [(Stats. 2018, ch. 1015)] . . . , effective January 1, 2019, . . . eliminated the natural and probable consequences doctrine as it relates to murder." (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 323, review granted March 18, 2020, S260493.) The jury returned its verdict in October 2018 before the effective date of Senate Bill No. 1437. Thus, as appellant notes in his opening brief, the natural and probable consequences doctrine was "still[]viable at the time of trial."

administer a disciplinary beating (the target offense), and the killing of Limon (the nontarget offense) was a natural and probable consequence of the crime (the beating) aided and abetted. But this was not the prosecutor's implied malice theory. The theory was that (1) appellant committed an act (asking Agustine to beat up Limon) the natural and probable consequences of which were dangerous to life, (2) appellant knew his request endangered Limon's life, and (3) he "'"act[ed] with conscious disregard for life."' . . ."' (*Cravens*, *supra*, 53 Cal.4th at p. 507.)

The natural and probable consequences doctrine has nothing to do with the prosecutor's implied malice theory. "[T]he use of the term 'natural [and probable] consequences' in the CALCRIM No. 520 definition of implied malice does not import into the crime of murder the case law relating to the distinct 'natural and probable consequences' doctrine developed in the context of aiding and abetting liability." (*People v. Martinez* (2007) 154 Cal.App.4th 314, 334 (*Martinez*).)

Because the natural and probable consequences doctrine was not an issue in this case, the trial court did not have a duty to instruct sua sponte on the doctrine. "[T]he sua sponte duty to [so] instruct a jury . . . arises only when the prosecution relies on the 'natural and probable consequences' doctrine in the context of aiding and abetting liability." (*Martinez*, *supra*, 154 Cal.App.4th at p. 333.) "Unlike a case based upon the 'natural and probable consequences' theory of accomplice liability . . . , the facts of this case did not require the jury to analyze two distinct transactions—a target crime, such as robbery, and a nontarget crime, such as murder—and determine whether a murder by a confederate was the natural and probable consequence of a

robbery the defendant accomplice had agreed to aid and abet." (*Ibid.*)

Trial Court's Alleged Failure to Instruct on Lesser Included Offense of Involuntary Manslaughter

Appellant maintains that the trial court had a duty to instruct the jury sua sponte on the lesser included offense of involuntary manslaughter, which is defined as the unlawful killing of a person without malice "in the commission of an unlawful act, not amounting to a felony." (§ 192, subd. (b).) Involuntary manslaughter may be predicated on an unlawful act constituting a misdemeanor, such as simple assault or battery, if the "misdemeanor was dangerous to human life or safety under the circumstances of its commission." (*People v. Cox* (2000) 23 Cal.4th 665, 675.) Appellant asserts, "Here, there was ample evidence to support finding [he] aided and abetted or conspired to commit only misdemeanor assault and battery."

"'[I]t is the "court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed." [Citation.]' [Citations.] 'Conversely, even on request, the court "has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction." [Citation.]' [Citation.] Substantial evidence 'is not merely "*any* evidence . . . no matter how weak" [citation], but rather "'evidence from which a jury composed of reasonable [persons] could … conclude[]'" that the lesser offense, but not the greater, was committed. [Citations.]' [Citation.] "'On appeal, we review independently the question whether the court failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327-1328; see also

People v. Breverman (1998) 19 Cal.4th 142, 162, italics added [instruction on lesser included offense "required whenever evidence that the defendant is guilty *only* of the lesser offense is 'substantial enough to merit consideration' by the jury"].)

The trial court did not have a duty to instruct sua sponte on involuntary manslaughter. There is no substantial evidence that, without knowing that his request to get rid of Limon endangered Limon's life, appellant intended that Agustine commit only a simple, misdemeanor assault or battery to discipline Limon for his serious transgressions.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

James K. Voysey, Judge

Superior Court County of Santa Barbara

Sylvia W. Beckham, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.